IN THE COURT OF APPEAL [1993] QCA 001

SUPREME COURT OF QUEENSLAND

Appeal No. 103 of 1992

BERNARD ABDIEL POHLMANN

Respondent

- and

GILBERT ROBERT HARRISON and
JUNE DOROTHY HARRISON

Appellants

JOINT JUDGMENT OF THE PRESIDENT AND WHITE J.

Delivered the 3rd day of February, 1993

This is an appeal from a judgment in the District Court on 1 May 1992 whereby the appellants were ordered to pay to the respondent the sum of $66,132.22 together with the respondent's taxed costs, including any reserved costs, of and incidental to the action.

Early in November 1988, the respondent, who is a registered builder, agreed with one Kay Anderson that, in return for payments she would receive, she would find customers to engage the respondent to build houses for them in the Hervey Bay area where the respondent and his wife and Anderson and her husband lived. The relationship between the respondent and Anderson seems never to have been defined with precision or formalised, but three such transactions were subsequently entered into, with the respondent named as builder in each of the contracts with the third parties.

However, another venture in which the respondent and

Anderson were involved, in which the appellants were the customers, took a different form.

The appellants, who lived in Victoria, had first met Anderson earlier that year when she worked for a building company from which she later removed some house plans and specifications when her employment terminated. When the appellants returned to Hervey Bay, they again met Anderson and expressed renewed interest in having a house built in accordance with one set of these plans and specifications. At Anderson's request, the respondent worked out a price of $84,000.00.

A meeting took place between the appellants, the respondent and his wife and Anderson at Anderson's home on 11 November 1988. The respondent was introduced as the builder and variations to the plan and specifications were discussed and agreed on at the quoted price of $84,000.00. The respondent produced two Master Builders' standard form contracts which he signed as builder and left with the appellants for them to check with their solicitor and to insert some further details which were needed. It was intended that the contracts, when completed in due course, would be handed by the appellants to Anderson.

During the following days, there were a number of meetings between the appellants, Anderson and the respondent's wife at an office set up by Anderson using the name K.A. Homes. The respondent's wife worked in the office together with Anderson.

On 17 November 1988, the appellants were asked by Anderson to sign the contracts, which named the appellants as owners and

the respondent and his wife as builders. However, Anderson also asked the appellants to make a deposit cheque of $1,400.00 to K.A. Homes. The appellants declined to do so because K.A. Homes was not named as a contracting party. Following a visit by the appellants and Anderson to her then solicitor, they returned to the office of K.A. Homes and fresh contracts were prepared showing the parties to be the appellants as owners and K.A. Homes as builder. These contracts were then signed by the appellants and Anderson, but the respondent was not informed. A few days later, he gave notice to the Builders' Registration Board of his intention to build the appellants' house.

The appellants, who had returned to Victoria, moved with their furniture to Hervey Bay at about the end of January 1989. They arranged with the respondent that their furniture would be stored in the house which was by then almost complete. During the intervening period, the appellants had made at least one progress payment to K.A. Homes. Further, advertising promotions, letters and business cards, as well as site signs, described the respondent as nominee builder for K.A. Homes or K.A. Homes Pty. Ltd., a company which Anderson had caused to be formed. Although some material used in the construction of the appellants' house was purchased by the respondent, all payments, including some amounts described as "wages" paid to the respondent, were made by K.A. Homes.

It seems that, nonetheless, the respondent believed that he had contracted as builder with the appellants, and none of

the circumstances referred to would necessarily alert him to the contrary, especially in the context of the other three contracts with different parties, the lack of definition or precision in his relationship with Anderson, and the omission of either Anderson or the appellants to inform him that the appellants had not signed the contract he had left with them but a different contract with K.A. Homes named as builder. It is probably not surprising that the appellants had not provided the respondent with this information, reasonably expecting that such matters would be discussed by the respondent and K.A. Homes in the course of their relationship.

Early in February 1989, a substantial payment was due from the appellants and the respondent asked that the payment be made to him rather than to K.A. Homes. It was then that the appellants produced to the respondent their copy of the contract showing K.A. Homes as the builder and their copy of the notice to the Builders' Registration Board which the respondent had forwarded in November 1988 and in which he was named as builder. By this time, relations between the respondent and Anderson had deteriorated and been terminated.

By 24 February 1989, the respondent had finished the construction of the appellants' house with the exception of two small items and the appellants moved into occupation.

The total amount paid by the appellants in respect of the construction of their house is $34,100.00, and the trial judge allowed a set off of $1,273.37 in respect of some relatively

minor faulty workmanship. These amounts, aggregating $35,373.37, are $48,626.63 less than the $84,0000.00 quoted for the construction of the house. The judgment given in favour of the respondent by the trial judge was for this sum of $48,626.63 plus interest under the Common Law Practice Act totalling $17,505.59.

After the respondent sued the appellants in this action, they tried unsuccessfully to involve Anderson by interpleader proceedings. However, she has left the jurisdiction and there was no real attempt to suggest in this Court that the respondent has an effective chance of recovering any amount from her. Further, it is plain that, as an unregistered builder, she cannot recover the unpaid balance from the appellants: Builders' Registration and Homeowners' Protection Act 1979 (as amended), s.53.

The trial judge found that a contract for the building of the appellants' house had been made by the appellant and the respondent. Even if that conclusion could be supported on the evidence, there is plainly no signed written contract, and an oral contract would be unenforceable by the respondent: s.75 of the Builders' Registration and Homeowners' Protection Act 1979 (as amended).

However, if the parties had entered such an oral contract, the respondent would be entitled to succeed on his alternative quantum merit claim: Pavey & Matthews Pty. Ltd. v. Paul (1986) 162 CLR 221. Such a claim is one of the categories of case in

which the facts give rise to a prima facie obligation to make restitution, in the sense of compensation for the benefit of unjust enrichment, to the person who has sustained the countervailing detriment: Pavey at pp.227, 257; Australia and New Zealand Banking Group Ltd. v. Westpac Banking Corporation (1988) 164 CLR 662, 675; David Securities Pty. Ltd. v. Commonwealth Bank of Australia (1992) 109 ALR 57.

The essential basis for such a claim, namely, execution of work for which no enforceable contract exists and acceptance of the work by the party for whom it is performed, is clearly demonstrated in this case. It is, of course, of fundamental significance to the conclusion that the respondent has established the basis for a quantum merit claim that:

(i) the contract between the appellants and Anderson is unenforceable, as is any contract between the appellants and the respondent; or

(ii) it was the respondent who build the appellants' house. Indeed, he built it with the active encouragement of the appellants.

The appellants also argued that the respondent's quantum merit claim should fail because he had not proved the amount to which he is entitled. However, it is well established that the unenforceable contract for the building of the house is relevant as evidence on the question of amount (see, e.g. Pavey at pp. 250, 257), and in the circumstances of this case, the trial judge was amply justified in arriving at the figure for which he

gave judgment.

Finally, it was argued that ss.53(2)(d) and (e) of the Builders' Registration and Homeowners' Protection Act, which struck down Anderson's claims against the appellants also prevents the respondent from succeeding on his quantum merit claim. The terms of the statutory provisions do not bear that meaning and neither their language or apparent purpose suggest that it was the legislative intention that a person whose house is built by a registered builder should be excused from paying him for his work in circumstances like the present.

The appellants accordingly fail in their unmeritorious search for a windfall at the respondent's expense.

The appeal is dismissed with costs to be taxed.

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SUPREME COURT OF QUEENSLAND

Appeal No. 103 of 1992

BERNARD ABDIEL POHLMANN

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- and

GILBERT ROBERT HARRISON and
JUNE DOROTHY HARRISON

Appellants

The President
Mr Justice Pincus
Justice White

Judgment delivered the 3rd day of February, 1993. Joint reasons for judgment by the President and White J., separate reasons by Pincus JA. concurring as to the order.

APPEAL DISMISSED WITH COSTS.

IN THE COURT OF APPEAL

SUPREME COURT OF QUEENSLAND

Appeal No. 103 of 1992

The President
Mr Justice Pincus
Justice White

BERNARD ABDIEL POHLMANN

Respondent

- and

GILBERT ROBERT HARRISON and
JUNE DOROTHY HARRISON

Appellants

JOINT JUDGMENT OF THE PRESIDENT AND WHITE J.

Delivered the 3rd day of February, 1993

MINUTE OF ORDER: **Appeal dismissed with costs.**

CATCHWORDS: **UNJUST ENRICHMENT - QUANTUM MERIT - Appeal from award of damages in favour of builder who sued on an unenforceable contract - whether respondent entitled to a quantum merit - whether appellants unjustly enriched.**

Paney and Matthews Pty. Ltd. v. Paul (1986) 162 CLR 221, ANZ Banking Group Ltd. v. Westpac (1988) 164 CLR 662, David Securities Pty. Ltd. v. Commonwealth Bank of Australia (1992) 109 ALR 57, Lundstrom Construction Company v. Y. 94 NSW 527 (1959), Karon v. Kellog 261 NW 861 (1935), Builders' Registration and Homeowners' Protection Act ss.53(2)(d) and (e) 75.

Counsel: Mr A.J.H.Morris with him Mr R.S. King for the appellants

Mr D.J. McGill for the respondent

Solicitors: A.G. Daniel for the appellants

Messrs. Carswell and Company for the respondent

Hearing Date: 12th and 13th October, 1992

IN THE COURT OF APPEAL

SUPREME COURT OF QUEENSLAND

Appeal No. 103 of 1992

BETWEEN:

BERNARD ABDIEL POHLMANN Respondent

AND:

GILBERT ROBERT HARRISON and
JUNE DOROTHY HARRISON Appellants

JUDGMENT - PINCUS J.A.

Delivered the third day of February 1993

I have had the advantage of reading the joint reasons of the President and White J. and I agree that the appeal should be dismissed, substantially for those reasons.

It appears to me clear that the finding of the learned trial judge that there was a contract between Pohlmann as builder and the Harrisons as owners cannot be sustained and the real question is whether the judgment should be upheld on the alternative claim based on quasi- contract. The essential facts with respect to that claim appear to be:

1. Although there was no contract between Pohlmann and the Harrisons, Pohlmann not unreasonably believed there was such a contract.

2. In truth, the Harrisons contracted with Anderson.

3. There is no possibility of the Harrisons being liable to pay Anderson any more money; if the appeal were to succeed, the Harrisons would obtain a substantial benefit, at Pohlmann's expense.

4. The probability is that Pohlmann cannot recover from Anderson the money due for the work he has done.

We were referred to no authority in which, there being a claim in quasi-contract, the facts were reasonably similar to those set out above. As the decisions of the High Court referred to in the judgments of the other members of the Court show, the basic question is whether the Harrisons have been unjustly enriched. That they have been enriched cannot be doubted and although opinions might differ on the question whether their attainment of that state was unjust, the better view appears to be that taken by the learned primary judge.

I should add that there are reported decisions in the United States giving general support to the possibility of bringing such a suit as succeeded here. One such is Lundstrom Construction Company v. Y 94 N.W. 2d. 527 (1959), especially at 532-533. Another is Karon v. Kellogg 261 N.W. 861 (1935), where the plaintiffs who supplied labour and materials, having failed to establish any contract with the defendants, nevertheless

succeeded on the basis of unjust enrichment.

IN THE COURT OF APPEAL

SUPREME COURT OF QUEENSLAND

Appeal No. 103 of 1992

Before the Court of Appeal

The President

Mr. Justice Pincus

Justice White

BETWEEN:

BERNARD ABDIEL POHLMANN — Respondent

AND:

GILBERT ROBERT HARRISON and
JUNE DOROTHY HARRISON — Appellants

JUDGMENT - PINCUS J.A.

Delivered the third day of February 1993

Counsel: A.J.H. Morris, with him R.S. King for the appellants
D.J. McGill for the respondent

Solicitors: A.G. Daniel for the appellants
Carswell & Company for the respondent

Hearing Date(s): 12 and 13 October 1992